Supreme Court of the United States
OCTOBER TERM, 1974

NOV 27 1974
MICHAEL RODAK, JR.

No. 74-519

EDGAR FRANKEL,

Petitioner.

-against-

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

BRIEF OF RESPONDENT, AMERICAN EXPORT ISBRANDTSEN LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a seaman entitled to the payment of maintenance beyond the date on which he attained maximum benefit of medical care?

2. Do the Appellate Courts of the State of New York have the power to reverse a judgment based on a jury verdict where there was no evidence to support the jury's verdict?

STATEMENT OF THE CASE

Petitioner, while serving as a messman on the s/s Container Forwarder, a vessel owned by Respondent, suffered a traumatic amputation of the tips of two fingers of his right hand on October 6, 1969 when a cabin door closed in severe weather.

On October 9, 1969, petitioner was admitted as an inpatient at the United States Public Health Service Hospital on Staten Island for treatment of his injuries. He was discharged to outpatient status on October 29, 1969.

Petitioner then visited the hospital on an outpatient basis for evaluation at approximately 8 week intervals throughout 1970 and into 1971. During this period, petitioner was soaking his fingers at home.

On June 22, 1971, plaintiff was examined and his status evaluated by the Chief of Orthopedic Services at the hospital. Based on his examination and review of petitioner's records, the Chief of Orthopedic Services concluded that plaintiff had achieved maximum medical benefit of medical care. (R-142)

On the trial of the action, this doctor testified that the fact that plaintiff was still soaking his fingers and rubbing them did not constitute active medical care (R-145). He further testified that petitioner had attained the maximum benefit of medical care and that no improvement in plaintiff's fingers was anticipated. (R-146).

The doctor called by respondent as an expert medical witness testified that he had examined plaintiff on July 7, 1971 and had concluded that petitioner had obtained a status quo and that no further treatment was indicated. (R-85-86). He also testified that while soaking the fingers after an amputation would assist in softening the scar and had

clinical value, once such a procedure had been carried out for a year and a half, it was worthless and would do nothing for the patient. (R-87). The doctor who testified on petitioner's behalf conceded that petitioner required "vocational assurance; that he was not talking about medfical rehabilitation". (R-192).

On the trial, the petitioner testified that he was not receiving schooling and was not in any vocational rehabilitation program. (R-58).

Following a four day trial, the jury awarded plaintiff a verdict and judgment was entered. Respondent appealed to the Appellate Term, First Department, Supreme Court of the State of New York, which reversed the jury's verdict and dismissed the complaint. In its opinion (Petitioner's Appendix A-4 through A-6), the Court held that there had been no evidence presented that further medical care would be of any benefit to the petitioner in improving his condition. The court also held that petitioner's medical expert's testimony concerning vocational rehabilitation was of no help to petitioner on the issue of maximum medical benefit.

The decision of the Appellate Term was affirmed by the Appellate Division, First Department, and by the Court of Appeals of the State of New York.

REASONS FOR DENYING THE WRIT

POINT I

A SEAMAN IS NOT ENTITLED TO THE PAYMENT OF MAINTENANCE AFTER HE HAS REACHED MAXIMUM BENEFIT OF MEDICAL CARE.

The New York Court of Appeals, in affirming the decision of the First Department of the Appellate Division,

cited *Berke v. Lehigh Marine Disposal Corp.*, 435 F.2d 1073 (2 Cir. 1970). In that decision, the Circuit Court held that a seaman was not entitled to maintenance beyond the time when he had attained maximum benefit of medical care.

That decision was based squarely on decisions of this Court which were set forth in Footnote No. 3 on page 1076 which reads in part as follows:

> "A seaman is not entitled to cure past the point at which his condition cannot be further improved. Farrell v. United States, 336 U.S. F.11 69 S.Ct. 707, 93 L.Ed. 850 (1949); Fitzgerald v. United States Lines Company, 374 U.S. 16, 19, 83 S.Ct. 1646, 10 L.Ed. 2d 720 N. 7 - - -."

Petitioner cites *Neff v. Dravo Corp.*, 407 F.2d 228 (3rd Cir. 1969), to suggest a conflict in the decisions of the Circuit Courts. That Court was very careful to set out at page 235 the following caveat:

> "Accordingly, in the light of the facts of *this record*, we hold the claim here to be embraced within the connotation of 'cure' as used in the phrase 'maintenance and cure'. (Emphasis ours)"

There was medical testimony on the trial of the *Neff* case that the plaintiff needed medical attention. The Court said at page 233: [redacted]

> " ' . . . *Nor is he entitled to maintenance and cure if he is not sufficiently ill or disabled as to make advisable some kind of medical attention.*' [Emphasis ours.] This, in effect, maintains he is entitled to maintenance and cure when in need of medical attention."

In the instant case, there was absolutely no proof that even the *Neff* criterion, "some kind of medical attention,"

would benefit the petitioner. It is therefore clear, on the record of this case, that petitioner having completely failed to prove the need for medical attention on the trial, does not meet the requirements of the *Neff* case cited in his brief as the basis for "an irreconciable conflict" between the Circuits as to when maintenance is payable.

With respect to petitioner's claim that the possibility of vocational rehabilitation requires the payment of maintenance, it should be pointed out that petitioner has presented a moot question to this Court and the Courts below, since on the trial of the action, he testified that he was in no actual program and was not receiving schooling (R-58).

Even if the question were not moot, there is absolutely no case law in support of petitioner's theory that maintenance is payable solely because a seaman is in vocational retraining.

Nor does *Scott v. Lykes Bros. Steamship Co.*, 152 F.Supp. 104 support petitioner's position. The plaintiff in that case was awarded additional maintenance after a truly astounding improvement in his physical condition following a period of additional medical therapy.

As this Court pointed out in *Farrell v. United States, et al.*, 336 U.S. 511 (1949) at page 519:

> "maintenance and cure is more certain if more limited in its benefits."

To require a shipowner to pay maintenance to a seaman undergoing vocational retraining would be a "distortion of the doctrine of maintenance and cure" warned against by this Court in *Farrell, supra*, p. 519.

POINT II

THE STATUTORY PROVISIONS CITED BY THE PETITIONER ARE INAPPLICABLE TO THE LAW OF MAINTENANCE AND CURE.

Petitioner argues in his brief that the Occupational Safety and Health Act of 1970 (29 U.S.C. 651) constitutes a mandate to the Courts to revise the law of maintenance and cure.

However, the Congress itself very explicitly stated that the Act was not to have that effect:

> "§653. Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected
>
> * * *
>
> (b) . . .
>
> (4) Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

In like manner, §902(3) of the Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. 901, specifically excludes that statute's application to "a master or member of a crew of any vessels".

POINT III

A STATE APPELLATE COURT CAN REVERSE A JUDGMENT BASED ON A JURY VERDICT AND DISMISS THE COMPLAINT WHEN THE EVIDENCE ADDUCED ON THE TRIAL WAS WHOLLY INSUFFICIENT AS A MATTER OF LAW.

In its opinion (R-255) the Appellate Term concluded that there was no evidence in the record that further medical care would be of benefit in curing petitioner's condition. In so doing, it gave petitioner the advantage of every favorable inference which could be drawn from the evidence.

The Court acted under the authority of New York State CPLR 5522* and in accordance with the New York Court of Appeals holding in *Blum v. Fresh Grown Preserve Corp.*, 292 N.Y. 241, 245:

> ". . . Thus, the question whether a verdict of a jury is 'unsupported by sufficient evidence' is always one of law for the Trial Judge. He *must* set aside such a verdict. (Getty v. Williams Silver Co., 221 N.Y. 34). The court is justified in directing a verdict in such case 'not because it would have authority to set aside an opposite one, but because there was an actual defect of proof, and, hence, as a matter of law, the party was not entitled to

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*New York State Civil Practice Law and Rules, Rule 5522:

"Disposition of appeal.

A court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment or order before it, as to any party. The court shall render a final determination or, where necessary or proper, remit to another court for further proceedings. A court reversing or modifying a judgment or order without opinion shall briefly state the grounds of its decision."

recover." (*McDonald v. Metropolitan St. Ry. Co.*, 167 N.Y. 66, 70.)

"The courts below have not mistaken their power. They have found that by no rational process could the trier of the facts base a finding in favor of the defendant upon the evidence here presented. This court has frequently pointed out that 'insufficient evidence is, in the eye of the law, no evidence.' "

See also, *B. Millens & Sons Inc. v. Vladich*, 23 N.Y. 2d 998 (1969) in which the New York Court of Appeals affirmed an order of the Appellate Division which reversed a judgment based on a jury verdict and dismissed a complaint on the ground that there was no proof.

Recognizing the power of the Federal Courts to grant judgment not withstanding the verdict, this Court in *Galloway v. United States*, 319 U.S. 372, 389 (1943) observed:

"If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is that the contention has been foreclosed by decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Rules of Civil Procedure. Cf. Rule 50, . . ."

This Court went on to point out (p. 390) "The jury was not absolute master of fact in 1791." In assessing the criteria for a directed verdict or judgment n.o.v. the Court stressed at p. 395:

"the essential requirement is that mere speculation be not allowed to do duty for probative facts."

Neely v. Eby Construction Co., 386 U.S. 317 (1967) acknowledges the power of a Federal Court of Appeals to

grant judgment n.o.v. where this has been denied in the trial court. See also *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935). The Court in *Neely* noted that even where the Court of Appeals had denied such a motion, it had reversed and granted it (p. 326).

As to the competing relief of a new trial, the Court said (p. 326) "Such a rule (mandating a new trial) would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary re-trials."

With particular application to the case at bar, we might return to the decision of *Galloway v. United States*, 319 U.S. 372, 392-393:

> "On the other hand, there is equal room for disbelieving it (Seventh Amendment) compels endless repetition of litigation and unlimited chance, by education gained at the opposing parties expense, for perfecting a case at other trials."

See also *New York, New Haven & Hartford Railroad Company v. Henagan*, 364 U.S. 441 (1960); *United States v. Generes*, 405 U.S. 93, 106 (1972).

Dismissal of a complaint because of a complete failure of proof does not violate the Seventh Amendment.

CONCLUSION

THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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